82-1616

No.

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

WEBER AIRCRAFT CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether confidential statements made by witnesses in an Air Force air crash safety investigation are protected from disclosure under Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5).

PARTIES TO THE PROCEEDING

The respondents are Weber Aircraft Corporation and Mills Manufacturing Corporation.

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v.

WEBER AIRCRAFT CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-19a) is reported at 688 F.2d 638. The district court's findings of fact and conclusions of law (App. B, *infra*, 21a-26a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 18a) was entered on September 21, 1982, and a petition for rehearing was denied on December 3,

1982 (App. D, *infra*, 29a). On February 23, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including April 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

1. The Freedom of Information Act, 5 U.S.C. 552(a)(4)(B), provides:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.

2. The Freedom of Information Act, 5 U.S.C. 552(b)(5), provides:

> (b) This section does not apply to matters that are—
>
> * * * * *
>
> (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

STATEMENT

1. Whenever an Air Force plane crashes, two investigations are routinely conducted. One of these, the "collateral investigation," is designed to gather and preserve evidence for use in official, on-the-record proceedings, such as courts-martial, administrative proceedings, and civil litigation. See A.F. Reg. 110-14 (July 18, 1977).[1] The other investigation, termed a "safety investigation," is an internal probe the sole purpose of which is "to prevent mishap recurrence." A.F. Reg. 127-4 ¶ 2-4 (Jan. 18, 1980).[2] In order to assure that the latter investigation uncovers as much evidence as possible, witnesses are promised that their statements will not be divulged to anyone for a purpose other than safety. A.F. Reg. 127-4 ¶ 2-5 (Jan. 18, 1980).[3] The Air Force credits this program with significant results in improving aircraft safety. The other military services follow similar procedures.

To protect the integrity of this vital program, the courts have recognized a civil discovery privilege for confidential witness statements made in connection with military safety investigations. See *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), cert. denied, 375 U.S. 896 (1963).[4] Similarly, two courts of appeals

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[1] The collateral investigation in this case was conducted pursuant to A.F. Reg. 110-14 (Nov. 1, 1973). App. A, *infra*, 2a n.2.

[2] The safety investigation in this case was conducted pursuant to A.F. Reg. 127-4 (Jan. 1, 1973), pertinent provisions of which are set forth at App. E, *infra*, 31a-33a. The regulation adopted in 1980 did not change the privilege or procedures involved here in any material respect.

[3] See also A.F. Reg. 127-4 ¶ 19(a)(3) (Jan. 1, 1973) (superseded 1980).

[4] See also *McCormick on Evidence* § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970).

have held that such statements are exempt from disclosure under Exemption 5 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(5), which protects "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." See *Cooper* v. *Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484 (5th Cir.), cert. denied, 444 U.S. 926 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975).

2. In the accident giving rise to the documents at issue in this litigation, an Air Force pilot, Captain Richard Hoover, suffered serious injuries when he ejected from his plane after an engine failure. Pursuant to its regulations, the Air Force conducted both a "collateral investigation" and a "safety investigation." When Captain Hoover brought suit in federal court for damages against the manufacturers of his plane's ejection equipment,[5] two of the defendant companies, respondents Weber Aircraft Corporation and Mills Manufacturing Corporation, sought discovery of the Air Force investigation reports pertaining to the accident. The Air Force released the complete record of the collateral investigation and portions of the safety investigation report. However, relying upon the privilege recognized in *Machin*, the Air Force declined to release confidential statements made in connection with the safety investigation by Captain Hoover and by an airman who helped to rig the ejection equipment. App. A, *infra*, 2a-3a.

Respondents then filed Freedom of Information Act requests seeking disclosure of the confidential state-

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[5] *Hoover* v. *Weber Aircraft Corp.*, C.D. Cal. No. CV 74-1064-WPG.

ments, but the Air Force refused to release the records in reliance on Exemption 5. After exhausting administrative remedies, respondents brought this action in the United States District Court for the Central District of California. App. A, *infra*, 3a-4a. In an uncontroverted affidavit filed in district court, the Air Force pointed out that the effectiveness of its safety investigation program

> depends to a large extent upon [its] ability to obtain full and candid information on the cause of each aircraft accident. * * * Open and candid testimony is received because witnesses are promised that for the particular investigation their testimony will be used solely for the purpose of flight safety and will not be disclosed outside of the Air Force. Lacking authority to subpoena witnesses, accident investigators must rely on such assurances in order to obtain full and frank discussion concerning all the circumstances surrounding an accident.

R.E. 42-43, Affidavit of Maj. Gen. Len C. Russell, Commander, Air Force Inspection and Safety Center at 2-3.[6] The Air Force also averred that the inability of safety investigators to make enforceable promises of confidentiality "would seriously hinder the accomplishment of prompt corrective action designed to preclude the occurrence of a similar accident" and that the privilege against forced disclosure of witness statements is therefore "the very foundation of a successful Air Force flight safety program" (*ibid.*). The Secretary of the Air Force concluded that public release of witness statements "would effectively dry up a vital source of information because the promise of

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[6] "R.E." refers to the Record Excerpts filed with the court of appeals.

confidentiality would no longer be enforceable." R.E. 58, Affidavit and Claim of Privilege by Thomas C. Reed, Secretary of the Air Force ¶ 17.

The district court held that the witness statements had been properly withheld under Exemption 5 (App. B, *infra*, 21a-26a; App. C, *infra*, 27a), but a divided panel of the court of appeals reversed, holding that Exemption 5 does not incorporate the *Machin* civil discovery privilege (App. A, *infra*, 1a-19a). The court based its decision upon *FOMC* v. *Merrill*, 443 U.S. 340 (1979), in which this Court held that Exemption 5 incorporates a limited privilege for confidential commercial information. The court of appeals acknowledged (App. A, *infra*, 8a n.6), however, that "*Merrill* expressly left open the question whether Exemption 5 incorporates [the *Machin*] privilege."

The court of appeals noted (App. A, *infra*, 6a) the statement in *Merrill* (443 U.S. at 355) that a claim that Exemption 5 incorporates a privilege other than those specifically recognized in the legislative history[7] "must be viewed with caution." Observing that the *Merrill* Court had found evidence in the legislative history that Congress "specifically contemplated a limited privilege for confidential commercial information" (*id.* at 359), the court of appeals stated (App. A, *infra*, 6a; emphasis added): "As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*"

Assuming "that the witness statements here would be shielded from civil discovery under the *Machin*

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[7] The Court stated in *Merrill* (443 U.S. at 355 & n.15) that the deliberative process, attorney-client and work-product privileges were "expressly mentioned" in the legislative history.

privilege" (App. A, *infra*, 8a), the court of appeals then reviewed the legislative history of the FOIA but found "no evidence * * * that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality" (*id.* at 10a). The court instead concluded (*id.* at 11a-12a) that Congress intended to protect only legal or policy matters and the exchange of ideas among agency personal, rather than purely factual material.

The court of appeals acknowledged (App. A, *infra*, 7a-8a) that its decision conflicts with decisions of the Fifth and Eighth Circuits handed down prior to *Merrill*. *Cooper* v. *Department of the Navy*, *supra*; *Brockway* v. *Department of the Air Force*, *supra*. However, the court disagreed (App. A, *infra*, 9a) with the Eighth Circuit's interpretation of the legislative history of Exemption 5. Expressing skepticism concerning the government's assertion that "future aircraft accident investigations will be seriously impaired if the military cannot assure witnesses that their statements will be held in confidence" (*id.* at 17a), the court criticized the Fifth Circuit for "relying on the Air Force's conclusory affidavit and 'common sense'" (*id.* at 17a-18a, quoting *Cooper* v. *Department of the Navy*, *supra*, 558 F.2d at 277) and likewise criticized the Eighth Circuit for "speculating that disclosure would result in 'the definite possibility that the deliberative process of the Air Force will be hampered'" (App. A, *infra*, 18a, quoting *Brockway* v. *Department of the Air Force*, *supra*, 518 F.2d at 1194).[8]

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[8] The court of appeals also held (App. A, *infra*, 14a-18a) that traditional equity principles did not justify nondisclosure of the witness statements.

Accordingly, the court of appeals remanded the case to the district court to determine which portions of the witness statements are factual and which constitute predecisional advice, opinions, or recommendations that may be withheld under the deliberative process privilege incorporated into Exemption 5 (see App. A, *infra*, 12a, 18a).[9]

Judge Smith dissented, stressing that "[w]e deal here with the lives of the persons who fly military aircraft" (App. A, *infra*, 18a). Judge Smith stated (*id.* at 19a): "I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe those cases to be sound, and I would follow them and affirm."

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the scope of the protection afforded by Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552(b)(5), to statements made under a promise of confidentiality by witnesses in military air crash safety investigations. If not reversed, the decision of the court of appeals requiring disclosure of such statements under the FOIA will seriously impair the ability of the military services to gather information needed to prevent aircraft accidents and will undermine the well-established privi-

[9] The court of appeals reversed the portion of the district court judgment holding that an Air Force medical report fell within the deliberative process privilege as incorporated into Exemption 5 (see App. A, *infra*, 13a). The court of appeals directed the district court on remand to determine whether portions of the report constituted "factual reporting" and were consequently not covered by Exemption 5 (*ibid.*). This portion of the court of appeals' decision is not at issue here.

lege applicable to such statements in civil discovery. The decision below is in direct conflict with the rulings of two other courts of appeals and is based upon a patently erroneous interpretation of *FOMC* v. *Merrill*, 443 U.S. 340 (1979), in which this Court specifically declined to reach the question posed by this case (*id.* at 355 n.17). Review by this Court is therefore warranted.

1. Two courts of appeals have held that statements made under a promise of confidentiality as part of a military air crash safety investigation are protected from disclosure by Exemption 5 of the FOIA. *Cooper* v. *Department of the Navy*, 558 F.2d 274 (5th Cir. 1977), modified on other grounds, 594 F.2d 484, cert. denied, 444 U.S. 926 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (8th Cir. 1975). In reaching this conclusion, both courts stressed the important purposes served by preserving the confidentiality of such statements. As the Fifth Circuit aptly put it (*Cooper* v. *Department of the Navy*, *supra*, 558 F.2d at 277):

> It seems plain, and the record bears out the notion, that in the circumstances of an aircraft accident investigation, assurances of confidentiality may be especially needed to obtain full disclosures. After all, something has gone wrong—perhaps gravely, even mortally wrong—under circumstances inherently dangerous. The machines and the procedures being employed are generally uniform and will be employed again tomorrow in the same manner unless altered. Is there something wrong with them generally? Or did the mishap (or catastrophe) occur because of a particular defect in a particular machine? Does a crewchief believe (though not with enough confidence to swear to it) that a pilot was unwell

> or distracted on the occasion of a fatal flight? Does he recall that he forgot to secure some important assembly of the craft before the flight? To permit a breach of assurances of confidentiality given in order to obtain answers to such questions as these may perhaps provide access to more information in that particular case, but common sense tells us that it will likely also assure that in future cases such information will never see the light of day and will be of use to no one. Logic argues, then, that in such a circumstance as the Aircraft Accident Safety Investigation, where [promises] of confidentiality have been found helpful and perhaps essential to obtaining information upon which to base corrective action, those promises should be respected and the answers and speculations which they produce shielded from disclosure.

See also *Brockway* v. *Department of the Air Force*, *supra*, 518 F.2d at 1194. As previously noted, it is also the considered judgment of the military services that preserving the confidentiality of witness statements provided as part of a safety investigation is necessary to prevent air crashes and to maximize the effectiveness of military aircraft. In requiring disclosure of such statements, the court below thus reached a result viewed as dangerous both by two courts of appeals and by those most knowledgeable and experienced in determining the causes of and preventing military airplane crashes. Review by this Court is warranted to resolve the conflict in the circuits and to prevent the deleterious consequences that the decision below may produce.

2. In departing from the prior decisions of the Fifth and Eighth Circuits, the court below noted (App. A, *infra*, 7a-8a) that those decisions antedated

FOMC v. *Merrill*, *supra*. While acknowledging (App. A, *infra*, 8a n.6) that *Merrill* "expressly left open the question whether Exemption 5 incorporates" the privilege for confidential statements made to military safety investigators, the court nevertheless based its decision squarely upon what it termed *Merrill*'s "new analysis of the interplay between Exemption 5 and civil litigation privileges" (App. A, *infra*, 5a). It is apparent, however, that *Merrill* does not require the result that the court of appeals reached.

a. Exemption 5 of the FOIA does not specify the particular types of agency records that may be withheld. Instead, it provides in general terms that a government agency may deny disclosure of any records "which would not be available by law to a party * * * in litigation with the agency" (5 U.S.C. 522(b)(5)). Since privileged information would not usually be "available by law" in civil discovery, this Court has stated that "it is reasonable to construe Exemption 5 to exempt those documents * * * normally privileged in the civil discovery context" (*NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975); footnote omitted). See also *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 184 (1975) ("Exemption 5 incorporates the privileges which the Government enjoys under the relevant statutory and case law in the pretrial discovery context"); *EPA* v. *Mink*, 410 U.S. 73, 91 (1973).

In *Merrill*, this Court remarked (443 U.S. at 354) that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." The Court also observed (*id.* at 355): "Given that Congress specifically recognized that certain discovery privileges [*i.e.*, executive privilege and attorney

work product privilege] were incorporated into Exemption 5, and dealt with other civil discovery privileges in exemptions other than Exemption 5, a claim that a privilege other than executive privilege or the attorney privilege is covered by Exemption 5 must be viewed with caution."

The court of appeals, however, read far more into *Merrill*. Stating (App. A, *infra*, 6a, quoting 443 U.S. at 359) that the *Merrill* Court "found evidence in the House Report on the FOIA * * * that Congress 'specifically contemplated a limited privilege for confidential commercial information,'" the court of appeals concluded (App. A, *infra*, 6a; emphasis added):

> As we read *Merrill*, this finding is the linchpin of the Court's analysis: *Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history.*

b. The court of appeals' interpretation of *Merrill* is inconsistent with the decision in *Merrill* itself, since the privilege there held to be incorporated into Exemption 5—a qualified privilege for confidential commercial information—was not "explicitly recognized" in the legislative history. Relying upon a sentence in the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) referring to documents or information received by the government "before it completes the process of awarding a contract," the Court in *Merrill* concluded (443 U.S. at 359; emphasis added; footnote omitted): "[*W*]*e think it is reasonable to infer* that the House Report * * * specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts." The Court went on to hold that the Federal Open Market Committee's Domestic Policy Directives are "at least potentially eligible for protection under Exemption 5" (*id.* at 360-361 n.23) and

explained (*id.* at 361; emphasis added): *"Although the analogy is not exact,* we think that the Domestic Policy Directives and associated tolerance ranges are *substantially similar* to confidential commercial information generated in the process of awarding a contract." Thus, this Court's decision in *Merrill* was based upon "infer[ence]" and "analogy" rather than explicit recognition by Congress of the privilege at issue.[10]

The court of appeals not only lost sight of what *Merrill* actually decided, it also distorted the language of this Court's opinion. As noted above, the Court stated (443 U.S. at 359; footnote omitted): "[W]e think it is reasonable to infer that the House Report * * * specifically contemplated a limited privilege for confidential commercial information pertaining to such contracts." Terming this sentence "the linchpin" of the analysis in *Merrill* (App. A, *infra*, 6a), the court of appeals ignored the phrase "we think it is reasonable to infer" and broadened the phrase "specifically contemplated" to mean "explicitly recognized." The court thereby read *Merrill* to hold that "Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history" (App. A, *infra*, 6a). This is a wholly unsupportable interpretation of the *Merrill* opinion.

c. The court of appeals again departed from the teaching of *Merrill* when it examined the legislative history for evidence that Congress intended Exemp-

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[10] The Court noted (443 U.S. at 358 & n.21) that in hearings preceding enactment of the FOIA, the General Counsel of the Treasury Department expressed concern about premature disclosure of information concerning Federal Reserve Open Market operations. Congress, however, did not specifically express a similar concern.

tion 5 to protect witnesses statements given under a promise of confidentiality. The court stated (App. A, *infra*, 8a): "[O]ur search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material." Rather, the court concluded (*id.* at 10a; footnote omitted) that "Congress intended Exemption 5 to incorporate an executive privilege of limited scope, protecting 'legal or policy matters' or 'advice * * * and exchange of ideas.'"

This conclusion is plainly inconsistent with *Merrill*, since it is apparent that much of the information there held to be protected by Exemption 5 would be subject to mandatory disclosure under the court of appeals' analysis. For example, bids by firms seeking a government contract or the government's appraisal of real estate it intends to sell are "purely factual," do not relate to legal or policy matters, and do not constitute advice or the exchange of ideas. Nevertheless, such information falls squarely within the protection recognized in *Merrill* for confidential commercial information received or generated before the government completes the process of awarding a contract. See, *e.g.*, *Government Land Bank* v. *GSA*, 671 F.2d 663 (1st Cir. 1982) (realty appraisal).

By insisting that Exemption 5 protects only "'legal or policy matters'" and "'advice * * * and exchange of ideas'" (App. A, *infra*, 10a), the court of appeals confused the deliberative process privilege and its rationale with the broader protection afforded by Exemption 5, which incorporates other privileges designed to serve other ends. Both in civil discovery and under Exemption 5, the deliberative process privilege does not reach "purely factual material contained in deliberative memoranda and severable from its con

text." *EPA* v. *Mink*, *supra*, 410 U.S. at 88. If not protected by another privilege, such facts in all likelihood will be drawn from sources accessible to the public or from government information subject to public disclosure, and therefore revealing them would not impair the government's decisionmaking processes. It does not follow, however, that all other privileges incorporated into Exemption 5 are subject to the same limitation. *Merrill* itself recognized the different purposes served by privileges embraced by Exemption 5 (443 U.S. at 359-360; emphasis added):

> The purpose of the privilege for predecisional deliberations is to insure that a decision-maker will receive the unimpeded advice of his associates. The theory is that if advice is revealed, associates may be reluctant to be candid and frank. * * * The theory behind a privilege for confidential commercial information generated in the process of awarding a contract, however, is not that the flow of advice may be hampered, but that the Government will be placed at a competitive disadvantage or that the consummation of the contract may be endangered.

See also *Brockway* v. *Department of Air Force*, *supra*, 518 F.2d at 1192-1193.

d. Contrary to the decision below, *Merrill* did not establish a rigid rule for determining whether a particular privilege is incorporated into Exemption 5. While advising that courts should proceed with caution before holding that Exemption 5 incorporates any privilege other than the executive and attorney privileges (443 U.S. at 355), *Merrill* held that just such a privilege fell within that Exemption. And in reaching that conclusion, *Merrill* relied upon inferences and analogies drawn from the legislative history (see *id.* at 359-363). *Merrill* also stated (*id.* at 355):

"[W]e hesitate to construe Exemption 5 to incorporate a civil discovery privilege that would substantially duplicate another exemption."

These general principles do not dictate the result reached by the court of appeals. Certainly *Merrill* did not repudiate "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself" and that "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *Dickerson* v. *New Banner Institute, Inc.*, No. 81-1180 (Feb. 23, 1983), slip op. 7. Particularly in view of the court of appeals' assumption (App. A, *infra*, 8a) that the statements at issue here "would be shielded from civil discovery by the *Machin* privilege," it seems obvious that those statements fall within the unambiguous language of Exemption 5, which protects materials "which would not be available by law to a party * * * in litigation with the agency."

The court of appeals did not point to anything in the legislative history of the FOIA that suggests that Congress intended such statements to be disclosed. And while the privilege in question here, like that in *Merrill*, is not mentioned in the legislative history, it is fully consistent with the expressed purposes of Exemption 5. In the passage upon which *Merrill* relied (see 443 U.S. at 359), the House Report (H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966)) made the following observations concerning that Exemption:

> Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff

> assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause [Exemption 5] is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate agency secrecy.

This passage plainly supports incorporation of the *Machin* privilege. Just as "advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to 'operate in a fishbowl' " (H.R. Rep. No. 1497, *supra*, at 10), witnesses questioned by military safety investigators would not be completely frank if their statements were subject to public disclosure. "Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests * * *" (*United States* v. *Nixon*, 418 U.S. 683, 705 (1974)). Similarly, just as government efficiency may be impaired by the premature disclosure of documents or information received or generated in preparation for the awarding of a contract or issuance of an order, decision, or regulation, the efficiency of the military's air safety program, as well as its overall effectiveness, will be adversely affected if binding promises of confidentiality may not be made to witnesses possessing vital information concerning the causes of military aircraft accidents.

For these reasons, the "flexible, commonsense approach" required for determining the scope of Exemption 5 (*EPA* v. *Mink*, *supra*, 410 U.S. at 91) must necessarily lead to incorporation of the recognized privilege for confidential witness statements such as those involved here. Exemptions to the FOIA must be given a reasonable interpretation in order to accomplish the purposes of the Act. See *Department of State* v. *Washington Post Co.*, 456 U.S. 595 (1982); *FBI* v. *Abramson*, 456 U.S. 615 (1982). The FOIA's overriding goal is to promote open government (*Renegotiation Board* v. *Bannercraft Clothing Co.*, 415 U.S. 1, 17 (1974)) and "to ensure an informed citizenry * * * [in order] to hold the governors accountable to the governed" (*NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). But disclosure of confidential statements made to military safety investigators is unlikely to promote open government, an informed citizenry, or any other beneficial purpose. If confidentiality cannot be ensured, statements provided as part of a safety investigation are unlikely to reveal anything more than those furnished in connection with the parallel collateral investigation. As a result, the information available to the public will not be increased appreciably, while that available to those concerned with aircraft safety will decrease both in quantity and reliability.[11]

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[11] It seems particularly unlikely that Congress intended to require disclosure under the FOIA of statements like those at issue here because to do so would undermine the well-established governmental privilege afforded such statements in civil litigation. See *Machin* v. *Zuckert*, *supra*; *McCormick on Evidence* § 108, at 230 n.6 (E. Cleary 2d ed. 1972); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2019, at 169 n.22 (1970). The FOIA was not intended to be used to circumvent the rules of civil discovery. *Renegotiation Board*

Finally, it is clear that incorporating the *Machin* privilege into Exemption 5 would not substantially duplicate any other exemption.

In sum, this Court's decision in *Merrill* does not require repudiation of the prior holdings of two courts of appeals that statements given in confidence to military air crash safety investigators are protected from mandatory disclosure by Exemption 5 of the FOIA. *Merrill* certainly did not hold that the FOIA requires disclosure of materials even though they fall within the plain language of Exemption 5, and there is nothing in the legislative history even remotely suggesting that Congress intended statements such as these to be disclosed. Such a holding would be a marked departure both from this Court's prior decisions concerning the meaning of Exemption 5 and from the ordinary rules of statutory construction. If, as the court of appeals believed, there is language in *Merrill* that lends support to such a result, clarification by this Court is warranted.

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v. *Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974). See also *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 143 n.10 (1975). But if any person may obtain such statements upon request under the FOIA, the privilege recognized in civil discovery will be of little value. A civil litigant denied discovery of such statements on grounds of privilege will be able to circumvent the privilege by filing an FOIA request. The effective abrogation of this important and well-established privilege is a matter that warrants review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1983

APPENDIX A

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

No. 80-5744

WEBER AIRCRAFT CORPORATION, A DIVISION OF WALTER KIDDE AND COMPANY, INC., and MILLS MANUFACTURING CORPORATION, PLAINTIFFS-APPELLANTS

v.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

Argued and Submitted Nov. 27, 1981

Decided Sept. 21, 1982

Appeal from the United States District Court for the Central District of California

Before CANBY and NORRIS, Circuit Judges, and SMITH,* District Judge.

NORRIS, Circuit Judge:

The principal issue in this case is whether witness statements given under a promise of confidentiality to an Air Force aircrash investigation board are exempt from the mandatory disclosure provisions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The district court held that the government was authorized to withhold the documents by Exemp-

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* The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

tion 5 of the FOIA, 5 U.S.C. § 552(b)(5),[1] and by traditional equity principles. We reverse and remand.

I. BACKGROUND

Captain Richard Hoover sustained serious injuries when he ejected from an Air Force airplane after the engine had failed. Under Air Force regulations governing inquiries into significant air crashes, the Air Force performed two investigations. A "collateral investigation" was conducted "to preserve available evidence for use in claims, litigation, disciplinary actions, administrative proceedings, and all other purposes." A.F. Reg. 110-14 ¶ 1(a) (July 18, 1977).[2] A "safety investigation," on the other hand, was conducted by a specially appointed Mishap Investigation Board, which produced a Mishap Report, a "privileged document" intended for "the sole purpose of taking corrective action in the interest of accident prevention." A.F. Reg. 127-4 ¶ 19(a)(1) (Jan. 1, 1973).[3]

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[1] According to 5 U.S.C. § 552(b)(5), "[the FOIA] does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

[2] The Air Force pursued the collateral investigation under A.F. Reg. 110-14 (Nov. 1, 1973), the predecessor to A.F. Reg. 110-14 (July 18, 1877). *See also* A.F. Reg. 127-4 ¶ 19(b) (Jan. 1, 1973) ("The Commander . . . will . . . direct a collateral investigation under AFR 110-14 . . . .").

[3] A.F. Reg. 127-4 ¶ 19(a)(3) (Jan. 1, 1973) states, in part: "These reports and their attachments will not be released to the Department of Justice, any United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States. These reports and their attachments will

Hoover sued designers of various parts of his parachute pack and harness assembly including Weber Aircraft Corporation (Weber), the initial designer, and Mills Manufacturing Corporation (Mills), the manufacturer of the canopy. After the suit was filed, Weber and Mills requested copies of all Air Force investigation reports pertaining to the accident. In response, the Air Force released the complete record of the collateral investigation and what the Air Force termed the factual portions of the Mishap Report, but withheld a number of documents, claiming they were exempt from mandatory disclosure under Exemption 5.

Weber and Mills then filed this action under the FOIA, seeking an injunction requiring the Air Force to disclose the withheld portions of the Mishap Report. The district court denied the injunction and

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be used solely within the USAF and will not be appended to nor enclosed in any report or document, including reports of claims investigations, unless the sole purpose of the other reports or documents is to prevent accidents."

A.F. Reg. 127-4 ¶ 19(a)(4) (Jan. 1, 1973) states: "Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused."

granted the government's motion for summary judgment. On appeal, Weber and Mills claim the district court erred in not compelling production of (1) the witness statements of Captain Hoover and Airman Dickson,[4] and (2) the withheld portions of medical reports submitted to the Mishap Board.

II. EXEMPTION 5

A. *The Witness Statements*

The first issue is whether Exemption 5 permits the government to withhold statements of military personnel given under a promise of confidentiality to an Air Force accident investigation board. This is an issue of first impression in the Ninth Circuit.

Exemption 5 protects "intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." The documents here are clearly intra-agency memoranda.[5] The issue is how broadly we should construe the phrase "not . . . available by law." In *EPA* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973), the Supreme Court left open the possibility that Ex-

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[4] Airman Dickson testified about his involvement in rigging the malfunctioning survival kit and automatic deployment assembly of Hoover's parachute.

[5] Appellants cite *Temple-Eastex, Inc.* v. *NLRB*, 410 F.Supp. 183, 185 (E.D. Tex. 1976), for the proposition that sworn statements are not inter-agency or intra-agency memoranda under Exemption 5. The present case, however, unlike *Temple-Eastex*, involves statements by government employees. Captain Weber and Airman Dickson were employed by the Air Force when they gave their statements. Their status can thus be measured by "the simplest measure of who is 'within' an agency: the payroll." *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

emption 5 might incorporate all civil litigation privileges: "Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, commonsense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies." *Id.* at 91, 93 S.Ct. at 837. More recently, however, the Court noted that "it is not clear that Exemption 5 was intended to incorporate every privilege known to civil discovery." *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 2809, 61 L.Ed.2d 587 (1979). Because the Court developed a new analysis of the interplay between Exemption 5 and civil litigation privileges, we now consider *Merrill* and its implications.

1. *The* Merrill *analysis.*

In *Merrill*, the Federal Open Market Committee (Committee) sought nondisclosure of certain monetary policy directives for the month during which they were in effect. The government first argued broadly that "Exemption 5 confers general authority upon an agency to delay disclosure of intra-agency memoranda that would undermine the effectiveness of the agency's policy if released immediately." 443 U.S. at 353, 99 S.Ct. at 2808. The Court flatly rejected that contention, *id.*, emphasizing that the government must rest its claim "on a privilege enjoyed by the Government in the civil discovery context," *id.* at 354, 99 S.Ct. at 2809.

The Court then agreed with the government's contention that the Committee's monetary policy directives could plausibly be shielded from civil discovery by a qualified privilege for confidential commercial information. *Id.* at 355-56, 99 S.Ct. at 2809-2810.

At the same time, the Court stressed that Exemption 5 should not be construed to incorporate all civil litigation privileges. *Id.* at 354, 99 S.Ct. at 2809. Noting that the legislative history to Exemption 5 "expressly mentioned" two privileges—attorney work product and the executive privilege for predecisional deliberations—the Court warned that a claim that Exemption 5 incorporates any other privilege "must be viewed with caution." *Id.* at 355, 99 S.Ct. at 2809. The Court then considered whether Exemption 5 incorporates any other civil discovery privilege, specifically the privilege for confidential commercial information.

The Court in *Merrill* first reviewed the legislative history of the FOIA for evidence that Congress intended to incorporate this specific privilege into Exemption 5. The Court found evidence in the House Report on the FOIA, H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966), that Congress "specifically contemplated a limited privilege for confidential commercial information." 443 U.S. at 359, 99 S.Ct. at 2811. As we read *Merrill*, this finding is the linchpin of the Court's analysis: Exemption 5 embraces only those civil discovery privileges explicitly recognized in the legislative history. Justice Stevens, in dissent, stated without rebuttal that the Court "proposes . . . that only those privileges that are recognized in the legislative history of FOIA should be incorporated in the Exemption." *Id.* at 366 n. 2, 99 S.Ct. at 2815 n. 2 (Stevens, J., dissenting).

The *Merrill* opinion went on to determine whether incorporating into Exemption 5 a qualified civil-litigation privilege for confidential commercial information would substantially duplicate the effect of any other FOIA exemption. *Id.* at 360, 99 S.Ct. at

2812. We think it clear, however, that the Court would not have undertaken this second step in its analysis unless it had first determined from the legislative history that Congress specifically intended Exemption 5 to encompass the privilege for confidential commercial information.

2. Brockway *and* Cooper.

Before the Supreme Court decided *Merrill*, the Fifth and Eighth Circuits held that Exemption 5 permits nondisclosure of witness statements given to military aircraft investigation boards under a promise of confidentiality. *Cooper* v. *Department of the Navy*, 558 F.2d 274, 278-79 (5th Cir. 1977), *modified on other grounds*, 594 F.2d 484, *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1979); *Brockway* v. *Department of the Air Force*, 518 F.2d 1184, 1193 (8th Cir. 1975). The Air Force relies heavily on these cases as precedent for nondisclosure of the witness statements.

Both courts held that, because Exemption 5 protects information unavailable "by law," the exemption incorporates the civil-discovery privilege found in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124 (1963). *Brockway*, 518 F.2d at 1190-91; *see Cooper*, 558 F.2d at 277. *Machin* held that the Air Force was privileged from disclosing in civil discovery statements given to a military accident investigation board under a promise of confidentiality. 316 F.2d at 339. In *Machin*, the D.C. Circuit had expressed concern that disclosure in civil litigation discovery would "hamper the efficient operation of an important Government program and perhaps even . . . impair the national security by weakening a branch of the mili-

tary." *Id.* Reasoning that incorporation of the *Machin* privilege into Exemption 5 would serve the purposes of that exemption, and protect the military's "deliberative processes," the *Cooper* and *Brockway* courts both concluded that Exemption 5 incorporates that privilege. 558 F.2d at 277; 518 F.2d at 1194.

3. Merrill *Applied.*

Guided by the *Merrill* analysis, we now consider whether the *Brockway* and *Cooper* courts were correct in concluding that Exemption 5 incorporates the *Machin* privilege, which the Supreme Court termed the executive "privilege for 'official government information' whose disclosure would be harmful to the public interest." *Merrill,* 443 U.S. at 355 n. 17, 99 S.Ct. at 2810 n. 17.[6]

For purposes of our analysis, we assume that the witness statements here would be shielded from civil discovery under the *Machin* privilege. *See Machin,* 316 F.2d at 339; *see also Merrill,* 443 U.S. at 355 n. 17, 99 S.Ct. at 2810 n. 17. We therefore apply the *Merrill* analysis to determine whether Congress intended Exemption 5 to protect factual material shielded from civil discovery by the *Machin* privilege.

The critical step in the *Merrill* analysis involves a search of the FOIA legislative history for evidence that Congress intended Exemption 5 to incorporate an executive privilege for "official government information." Our search convinces us that neither House of Congress intended Exemption 5 to incorporate an executive privilege that protects purely factual material. Indeed, the Senate Report assumes that Ex-

[6] The Supreme Court in *Merrill* expressly left open the question whether Exemption 5 incorporates this privilege. 443 U.S. at 355 n.17, 99 S.Ct. at 2810 n.17.

emption 5 would protect only "legal or policy matters." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Moreover, the legislative history suggests that Congress intended Exemption 5 to encompass factual material which is "inextricably intertwined" with legal or policy matters, but not to protect "memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context." *EPA* v. *Mink*, 410 U.S. 73, 87-88, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973).[7]

The Eighth Circuit in *Brockway* acknowledged the language of the Senate Report, but found such evidence of legislative intent unconvincing: "The House Report . . . is not as explicit in limiting Exemption 5 to only legal or policy matters . . . ." 518 F.2d at 1190. We disagree. Although the House Report is somewhat ambiguous,[8] it does contain evidence that

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[7] A previous bill contained an exemption for " 'inter-agency or intra-agency memorandums or letters *dealing solely with matters of law or policy.*' " *EPA* v. *Mink*, 410 U.S. 73, 90, 93 S.Ct. 827, 837, 35 L.Ed.2d 119 (1973) (quoting S. 1160, 89th Cong., 1st Sess. (1965)). This formulation was severely criticized for permitting "compelled disclosure of an otherwise private document simply because the document did not deal 'solely' with legal or policy matters. . . . As a result of this criticism, Exemption 5 was changed to substantially its present form." *Id.* at 90-91, 93 S.Ct. at 837. The change was not intended to weaken the factual-deliberative distinctive, however, "but to assure that factual material inextricably intertwined with deliberative material would also be exempt." *Robbins Tire & Rubber Co.* v. *NLRB*, 563 F.2d 724, 735 (5th Cir. 1977), *rev'd on other grounds*, 437 U.S. 214, 98 S.Ct. 2311, 57 L.Ed.2d 159 (1978).

[8] The House Report speaks broadly of protecting the secrecy of "documents or information which [a government agency] has received." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Exemption 5 was meant to protect only "advice from staff assistants and the exchange of ideas among agency personnel." H. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966).

Thus both the Senate and House Reports contain evidence that Congress intended Exemption 5 to incorporate an executive privilege of limited scope, protecting "legal or policy matters" or "advice . . . and exchange of ideas."[9] But we find no evidence in the legislative history that Congress intended Exemption 5 to protect witness statements given under a promise of confidentiality.

The legislative scheme of the FOIA, viewed as a whole, supports this reading of the House and Senate Reports. Congress enacted the FOIA to replace parts of the Administrative Procedure Act which, although designed to require disclosure of government information, "ha[d] been used as an authority for with-

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[9] Indeed, the Supreme Court's conception of Exemption 5 has consistently reflected this legislative history. *See, e.g., FBI* v. *Abramson*, —— U.S. ——, ——, 102 S.Ct. 2054, 2064, 72 L.Ed.2d 376 (1982) (the purpose of Exemption 5 is "protecting the give-and-take of the decisional process"); *EPA* v. *Mink*, 410 U.S. 73, 89, 93 S.Ct. 827, 836, 35 L.Ed.2d 119 (1973) ("Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other."); *see also Brockway*, 518 F.2d at 1190 ("In defining the scope of Exemption 5, most courts have held that the exemption generally operates to protect 'internal communications consisting of advice, recommendations, opinions, and other material reflecting deliberative or policy-making processes, but not purely factual or investigatory reports.'") (quoting *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971)).

holding, rather than disclosing, information." H. Rep. No. 1497, 89th Cong., 2d Sess. 4 (1966). The old law had permitted executive agencies to withhold information on the bare assertion that disclosure would not be in " 'the public interest.' " *Id.* at 5. The lack of guidelines in the old law led to abuse, because "[n]o Government employee at any level believes that the 'public interest' would be served by disclosure of his failures or wrongdoings." *Id.* at 9. Congress's purpose in enacting the FOIA was to curtail this abuse. *See id.* at 3-6; S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). The Senate and House Reports accordingly agreed "that all *materials* of the Government are to be made available to the public . . . unless explicitly allowed to be kept secret by one of the exemptions." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *see* H. Rep. No. 1497, 89th Cong., 2d Sess. 11 (1966). Further, the Senate Report expressly states that the Committee "attempted to delimit [Exemption 5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

A decision that Exemption 5 incorporates the *Machin* civil discovery privilege for official government information would be inconsistent with the legislative mandate to "delimit" the exemption narrowly. We believe the *Machin* privilege exceeds the scope Congress envisioned for Exemption 5. The *Machin* privilege protects statements of ministerial reporters of fact as well as of decisonmakers, and permits the government to shroud investigative reports in secrecy. We therefore conclude that the legislative history to the FOIA reveals no evidence that Congress intended

Exemption 5 to encompass the *Machin* civil-discovery privilege for official government information.[10]

To decide that the FOIA authorizes the government to withhold the witness statements at issue, we would have to amend the FOIA judicially. This we are unwilling to do. Opening up the FOIA to broad judicial interpretation would bring us full circle, creating the very evil Congress sought to avoid when it passed the FOIA, and "suggest[ing] no principled manner in which to confine FOIA's scope." *County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1040 (1st Cir. 1981).

We hold that Exemption 5 does not incorporate the *Machin* civil-discovery privilege for official government information. However, because Exemption 5 does incorporate the executive privilege for predecisional deliberations, we hold that the Air Force may withhold any "reasonably segregable" portion of the witness statements containing advice, opinions or recommendations, *see* 5 U.S.C. § 552(b), but must disclose any factual portion of the witness statements at issue. On remand, the district court must determine which portions, if any, contain advice, opinion or recommendations which the government may withhold from disclosure.

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[10] Exemption 5 is the only FOIA exemption properly before us on this appeal. We have already noted that the second step of the *Merrill* analysis—whether incorporating a particular civil discovery privilege into Exemption 5 would substantially duplicate the coverage of another exemption—is unnecessary when a court determines, as we have here, that the legislature did not intend to incorporate the privilege into Exemption 5. *See* part II A. 1., *supra*.

B. *The Medical Report*

The next issue is whether Exemption 5 protects "[a] one-page internal Air Force letter . . . [which] discusses the *findings* and recommendations of the life sciences member of the aircraft accident investigation board and contains further recommendations with regard to safety actions that should be considered for adoption by the Air Force." Affidavit of Major General Harold R. Vague, Judge Advocate General, United States Air Force (JAG) (emphasis added). Relying on the JAG's affidavit, *see EPA* v. *Mink*, 410 U.S. 73, 93, 93 S.Ct. 827, 838, 35 L.Ed.2d 119 (1973) (district court may rely on affidavits to determine content of documents); *Church of Scientology* v. *United States Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1979) (same), the district court found that the one-page medical report contains "opinions, conclusions, and speculations," *Weber Aircraft Corp.* v. *United States*, No. CV 79-2883, slip op. at 5 (C.D. Cal. Aug. 15, 1980) (unpublished findings of fact and conclusions of law), and authorized the Air Force to withhold the report.

It is unclear from the face of the affidavit what the JAG meant when he stated that the letter discusses the life science member's "findings." To the extent the "findings" constitute factual reporting, they are not covered by Exemption 5. To the extent the "findings" constitute "opinions, conclusions and speculations" forming the basis of recommendations, they are protected by Exemption 5. As we are unable to determine whether the district court had this distinction in mind when it reviewed the affidavit, we remand for reconsideration of the medical report in light of this opinion.

III. TRADITIONAL EQUITY PRINCIPLES

As an alternative ground for its summary judgment in favor of the government, the district court held that "[t]he 'public interest,' which is the 'primary consideration' in balancing the equities, is best served by non-disclosure of the documents. . . . Thus, using 'traditional equity principles,' the balance here is clearly in favor of the defendant and non-disclosure of the documents." *Id.* at 4. The government argues that the district court correctly concluded that it may exercise its broad traditional equity powers to permit nondisclosure of documents not protected by a specific FOIA exemption.

The language and legislative history of the FOIA refute the government's position. To the contrary, the language of the FOIA forbids the government to withhold information under the Act "except as specifically stated in [the FOIA]." 5 U.S.C. § 552(c); *see EPA* v. *Mink*, 410 U.S. at 79, 93 S.Ct. at 832 (FOIA exemptions "are explicitly made exclusive"). A court's exercise of its general equity powers is therefore repugnant to the FOIA's overriding purpose, "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965); *accord County of Madison* v. *United States Department of Justice*, 641 F.2d 1036, 1041 (1st Cir. 1981); *Soucie* v. *David*, 448 F.2d 1067, 1077 (D.C. Cir. 1971) ("We are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself.").

Further, the legislative history of the FOIA demonstrates Congress' intent to restrict judicial discre-

tion. "It is essential that agency personnel, *and the courts as well*, be given definitive guidelines in settling information policies. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added);[11] *see EPA* v. *Mink*, 410 U.S. 73, 80, 93 S.Ct. 827, 832, 35 L.Ed.2d 119 (1973); *Soucie* v. *David*, 448 F.2d 1067, 1077 n. 39 (D.C. Cir. 1971). The careful balancing of interests which Congress attempted to achieve in the FOIA would be upset if courts could exercise their general equity powers to authorize nondisclosure of material not covered by a specific exemption. *Id.* at 1077. We thus conclude that, in enacting the FOIA, Congress did not intend to leave district courts with authority to use their broad traditional equity powers to permit government agencies to withhold information.

We further conclude that the government's reliance on language in *Theriault* v. *United States*, 503 F.2d

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[11] While the language of the Senate Report is unequivocal, the House Report raises some questions, stating that a court "will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966). We nonetheless find this language unhelpful to the government's cause. Nowhere is there any indication that a court may exercise broad equity powers to authorize *non*-disclosure. Indeed, that would directly contradict Congress' purpose in enacting the FOIA, "to make clear beyond doubt that all materials of Government are to be available to the public unless specifically exempt from disclosure." *Id.* at 11. *See generally* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1150-56 (1975).

390 (9th Cir. 1974), is misplaced. In *Theriault*, we stated: " 'In exercising the equity jurisdiction conferred by the Freedom of Information Act, the court must weigh the effects of disclosure and nondisclosure, according to traditional equity principles.' " *Id.* at 392 (quoting *General Services Administration* v. *Benson*, 415 F.2d 878, 880 (9th Cir. 1969)). The government argues that this language authorized the district court to exercise its broad traditional equity powers in the case now before us. The government's interpretation of *Theriault*, however, ignores other qualifying language in the opinion indicating that district courts may use their equity powers to authorize nondisclosure under the FOIA only when "dire adverse potentialities" would result. 503 F.2d at 392 (citing *Rose* v. *Department of the Air Force*, 495 F.2d 261, 269 (2d Cir. 1974), (the judiciary may use its equity power in "a truly exceptional case."), *aff'd on other grounds*, 425 U.S. 352, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); *see also Halperin* v. *Department of State*, 565 F.2d 699, 706 (D.C. Cir. 1977) (courts are left with "some discretion in extreme circumstances" to use their equity powers to avoid disclosure of government information which would "do grave damage to the national security"). Moreover, the government's expansive reading of *Theriault* would result in nondisclosure of documents on a bare "public interest" rationale, *see, e.g.*, *Theriault* v. *United States*, 395 F.Supp. 637, 642 (C.D. Cal. 1975), despite the Supreme Court's recent admonition that Congress repeatedly rejected "any interpretation of the FOIA which would allow an agency to withhold information on the basis of some vague 'public interest' standard." *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 354, 99 S.Ct. 2800, 2809, 61 L.

Ed.2d 587 (1979). In light of *Merrill*, we conclude that *Theriault* must be read narrowly to mean that courts may use their equity power under the FOIA to authorize nondisclosure of information only in "extreme" or "exceptional" circumstances.

In the case now before us, however, the circumstances are neither "extreme" [12] nor "exceptional." We are hardly dealing with extremely sensitive information such as military secrets or troop movements. The government does not claim that disclosure of the factual portions of the witness statements will cause immediate and irreparable harm to the public interest. Rather the government's concern is that future aircraft accident investigations will be seriously impaired if the military cannot assure witnesses that their statements will be held in confidence. If that in fact proves to be the case, the Air Force should look for a solution to its problem in new legislation, not judicial improvisation. *See United States* v. *Olympic Radio & Television, Inc.*, 349 U.S. 232, 236, 75 S.Ct. 733, 736, 99 L.Ed. 1024 (1955). The government can make its case to Congress that confidentiality of witness statements is critical to the Air Force's longterm ability to obtain information in accident investigations. Only Congress can properly balance the Air Force's claim of future need against the public's interest in maximum disclosure of government information. The judiciary can at best speculate. *See, e.g., Cooper*, 558 F.2d at 277 (relying on the Air Force's conclusory affidavit and "common

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[12] The government has offered no record support for its conclusory argument that shielding the witness statements at issue would "safeguard the lives of flight crews, enhance the safety of those upon whom aircraft might otherwise fall, and contribute to the national defense." Appellee's brief at 11.

sense" for its conclusion that incorporating the *Machin* civil discovery privilege into Exemption 5 was necessary to protect the Air Force's "decisional processes"); *see also Brockway*, 518 F.2d at 1194 (speculating that disclosure would result in "the definite possibility that the deliberative processes of the Air Force will be hampered."). Congress has given continued attention to the FOIA, amending it to conform to the legislative will; judicial amendments are both unnecesasry and inappropriate. *See* Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1156 n. 1131 (1975).

REVERSED AND REMANDED for further proceedings consistent with this opinion.

RUSSELL E. SMITH, Senior District Judge, dissenting.

I dissent.

We deal here with the lives of the persons who fly military aircraft. The Air Force asserts a privilege which it considers essential to its air safety program. The district court sustained the privilege and found on evidence that there was a substantial need for the nondisclosure policy.[1]

In *Machin* v. *Zurkert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896, 84 S.Ct. 172, 11 L.Ed.2d 124 (1963), which was decided before the enactment of the FOIA, a privilege was found to exist as to statements given to the Air Force under promises that the statements would be held confidential. Following the enactment of the FOIA, the Fifth and Eighth Circuits, in *Cooper* v. *Department of the*

[1] *See Cooper* v. *Department of the Navy*, 558 F.2d 274, 276 (1977), *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1977).

Navy, 558 F.2d 274, *cert. denied*, 444 U.S. 926, 100 S.Ct. 266, 62 L.Ed.2d 183 (1977), and *Brockway* v. *Department of the Air Force*, 518 F.2d 1184 (1975), relied on *Machin* and, notwithstanding the FOIA, recognized the identical privilege asserted here.

The Supreme Court in *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 99 S.Ct. 2800, 61 L.Ed.2d 587 (1979), did not decide the exact question presented here, nor did it decide whether the privilege announced in *Machin* survived the enactment of the FOIA. In *Merrill* the Court said:

> The two other privileges advanced by the FOMC are a privilege for "official government information" whose disclosure would be harmful to the public interest, see *Machin* v. *Zuckert*, 114 U.S. App. D.C. 335, 338, 316 F.2d 336, 339, cert. denied, 375 U.S. 896 [84 S.Ct. 172, 11 L. Ed.2d 124] (1963), and a privilege based on Fed. Rule Civ. Proc. 26(c)(2), which permits a court to order that discovery "may be had only on specified terms and conditions, including a designation of the time or place." In light of our disposition of this case, we do not consider whether either asserted privilege is incorporated in Exemption 5.

443 U.S. at 355-56, n. 17, 99 S.Ct. at 2809-2810, n. 17. In view of the quoted language, I do not think it can be said that *Merrill* constitutes a repudiation, *sub silentio*, of *Cooper* and *Brockway*. I believe those cases to be sound, and I would follow them and affirm.

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-2883-WPG(Px)

WEBER AIRCRAFT CORPORATION, an unincorporated division of WEBER KIDDE AND COMPANY, INC.; MILLS MANUFACTURING CORPORATION, PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Aug. 15, 1980]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court having fully considered the defendant's Motion for Summary Judgment, the pleadings, all the memoranda filed herein, the affidavits attached thereto, and the argument of counsel, hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On October 9, 1973, Richard Hoover, Captain, United States Air Force, Retired, sustained injuries during an ejection from an Air Force F-106 B aircraft. The Air Force, pursuant to its regulation (AFR 127-4 dated October 24, 1975 and AFR 110-14, dated July 18, 1977) conducted investigations to determine the cause of the accident and to make recommendations as to the corrective action necessary to preclude future accidents.

2. Plaintiffs, Weber Aircraft Corporation and Mills Manufacturing Corporation, the defendants in a suit for damages brought by Captain Richard Hoover as a result of the injuries he sustained, implementing the Freedom of Information Act, requested that they be provided a complete copy of the Air Force Accident Investigation Report for their use in the suit for damages.

3. Plaintiffs requested a complete copy of said report September 1 and 6, 1977. Major General, Richard E. Merkling, Commander, Air Force Inspection and Safety Center, Norton Air Force Base, denied plaintiffs' request for the complete report on September 30, 1977. Major General Merkling provided plaintiffs with substantial parts of the Report. The excised portions of the Report are the following: investigating board's opinions, conclusions, findings and recommendations; the statements of witnesses before the board; and certain points of the Life Sciences report containing medical data pertaining to Captain Hoover.

4. The decision to withold portions of the report was appealed by plaintiffs to the Secretary of the Air Force on November 25, 1977. Deputy Administrative Assistant to the Secretary of the Air Force, El-

don L. McColl, granted the appeal in part, portions of five pages of the Life Sciences Report was made available to plaintiffs.

5. Plaintiffs exhausted all administrative remedies available to them prior to filing this action under the Freedom of Information Act, 5 U.S.C. 552. On July 31, 1979, plaintiffs instituted this action requesting this court to enjoin the Air Force from witholding the excised documents.

6. Since 1944, it has been the policy of the Air Force that aircraft accident investigations under the Air Force Aviation Safety Program are to be used solely for aviation safety and will not be used for any disciplinary actions or disclosed to anyone outside of the Air Force. This policy was established to create an atmosphere that would permit aircraft accident witnesses to be completely frank and uninhibited in providing information to the accident investigators in the course of their examination under the Air Force Aviation Safety Program. In order to insure that witnesses understand this policy, the Air Force regulation (AFR 127-4 dated July 18, 1977) requires that witnesses to aircraft accidents be advised that "their testimony will be used solely for the purposes of flight safety and will not be released to persons outside of the Air Force." This promise is made to persuade witnesses, who are not sworn, to express their opinions and talk freely even though the information revealed may be unsupported in fact, self-incriminating, embarrassing or cast blame upon a friend or co-worker.

7. The Air Force likewise desires that the Safety Program investigators in evaluating the information they gather from the witnesses be completely candid in determining the cause of the accident. They are

encouraged to speculate, opine, analyze and make recommenadtions that may not be fully supported by facts. In order to insure that all possible causes of an accident are identified and considered and all corrective actions are weighed, investigators operate with the understanding that their deliberations and their report will not be released outside of the Air Force or used for any purpose other than aviation safety.

8. The defendant has demonstrated a substantial need for non-disclosure of the documents in question in this action; and plaintiffs have made no showing sufficient to outweigh defendant's needs.

9. The "public interest," which is the "primary consideration" in balancing the equities, is best served by non-disclosure of the documents.

10. Thus, using "traditional equity principles," the balance here is clearly in favor of the defendant and non-disclosure of the documents.

11. To the extent that these Findings of Fact contain Conclusions of Law, they shall be deemed incorporated within the Conclusions of Law.

CONCLUSIONS OF LAW

12. This Court has jurisdiction over the subject matter of this action, the action being to enjoin the defendant from withholding the complete, that is, certain unprovided portions of the aforesaid Air Force accident investigation report, pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

13. The Freedom of Information Act was passed to increase the public's access to governmental records unless the records fall within the ambit of one of nine exemptions contained in the act. These exemptions are to be construed narrowly. *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F.2d

698 (D.C. Cir. 1971); *Soucie* v. *David*, 448 F.2d 1067 (D.C. Cir. 1967). Whenever governmental records are withheld, the burden of establishing their exemption from mandatory disclosure rests with the agency concerned. 5 U.S.C. § 552(a)(3).

14. In addition to, and notwithstanding the applicability of the aforementioned nine exemptions, the trial court has and must exercise equity jurisdiction in that the Court must weigh the effects of disclosure and non-disclosure according to traditional equity principles and determine the best course to follow in the given circumstances. "The effect on the public is the primary consideration." *Theriault* v. *United States*, 503 F.2d 390, 392 (9th Cir. 1974).

15. The defendant has demonstrated a substantial need for non-disclosure of the documents in question in this action; and plaintiffs have made no showing sufficient to outweigh defendant's needs as a matter of law as well as fact.

16. The "public interest," which is the "primary consideration" in balancing the equities, is best served by non-disclosure of the documents as a matter of law as well as fact.

17. Thus, using "traditional equity principles," the balance here is clearly in favor of the defendant and non-disclosure of the documents as a matter of law as well as fact.

18. The findings and recommendations of the Accident Board, the Board's proceedings, and the final pages of the Life Science reports contain opinions, conclusions, and speculations which are "intra-agency" communications that would not be available by law to a party other than an agency in litigation with an agency, and hence are exempted from mandatory disclosure by the provisions of 5 U.S.C. § 552(b)(5).

Wu v. *National Endowment for Humanities*, 460 F.2d 1030 (5th Cir. 1972); *International Paper Company* v. *F.P.C.*, 438 F.2d 1349 (2d Cir. 1971); *Machin* v. *Zuckert*, *supra*.

19. To the extent that these Conclusions of Law contain Findings of Fact, they shall be deemed incorporated within the Findings of Fact.

DATED: This 14 day of August, 1980.

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 79-2883-WPG(Px)

WEBER AIRCRAFT CORPORATION, an unincorporated division of WALTER KIDDE AND COMPANY, INC.; MILLS MANUFACTURING CORPORATION, PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

[Filed Aug. 15, 1980]

JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law filed herewith, it is the judgment of the Court that:

1. The permanent injunction sought by the plaintiffs, to require the Air Force to provide plaintiffs with a complete copy of the Aircraft Accident Report on the October 9, 1973 accident wherein Captain Richard Hoover sustained injuries, and particularly the portions thereof not heretofore provided to plaintiffs, be and the same hereby is denied;

2. The complaint and each and every cause of action therein alleged is hereby dismissed with prejudice; and

3. Each party to bear its own costs.

DATED: 8/14/80

/s/ William P. Gray
WILLIAM P. GRAY
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-5744

D.C. No. CV 79-02883

WEBER AIRCRAFT CORPORATION, a division of WALTER KIDDE AND COMPANY, INC., and MILLS MANUFACTURING CORPORATION, PLAINTIFFS-APPELLANTS

vs.

UNITED STATES OF AMERICA, DEFENDANT-APPELLEE

[Filed Dec. 3, 1982]

ORDER

Before: CANBY and NORRIS, Circuit Judges, and SMITH *, District Judge.

Judges Canby and Norris have voted to deny the petition for rehearing. Judge Smith would grant the petition for rehearing. The panel as constituted in the above case unanimously rejects the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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* The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX E

Air Force Regulation 127-4 (Jan. 1, 1973), provided in pertinent part:

> **19. Purpose and Limitations on the Use of Accident and Incident Reports.** This paragraph does not apply to ground or explosives accident/incident reports.
>
> a. Privileged Reports. These reports and their attachments are prepared by, for, or at the direction of The Inspector General, USAF, and his deputies, directors, and assistants and are, therefore, privileged documents. (The disposition of privileged documents will be as directed by AFM 12-50 and AFR 205.1.) When destruction is authorized for unclassified reports, tear or otherwise deface documents in a manner that offers positive assurance against further access to the information.
>
> (1) Reports and investigations of USAF accidents and incidents made under this regulation will be used only within the USAF to determine all factors contributing to the mishap for the sole purpose of taking corrective action in the interest of accident prevention (see paragraph 20).
>
> (2) Theses reports and their attachments will not be used as evidence nor to obtain evidence for disciplinary action; as evidence in determining the misconduct or line-of-duty status of any personnel; as evidence before flying evaluation boards; as evidence to determine pecuniary liability; or, except as stated in (4) below, as evidence to determine liability in claims against the US Government.
>
> (3) These reports and their attachments will not be released to the Department of Justice, any

United States attorney, or any other person for litigation purposes in any legal proceeding, civil or criminal, except as stated in (4) below. These prohibitions include any action by or against the United States. These reports and their attachments will be used solely within the USAF and will not be appended to nor enclosed in any report or document, including reports of claims investigations, unless the sole purpose of the other reports or documents is to prevent accidents. This prohibition includes crash, preliminary, supplementary, and progress reports, formal reports on AF Forms 711, and special accident/incident investigative reports prepared by the Dir of Aerospace Safety.

(4) Notwithstanding the restrictions on use of these reports and their attachments and the prohibitions in this regulation against their release, factual material included in accident/incident reports, covering examination of wreckage, photographs, plotting charts, wreckage diagrams, maps, transcripts of air traffic communications, weather reports, maintenance records, crew qualifications, and like nonpersonal evidence may be released as required by law or pursuant to court order or upon specific authorization of The Judge Advocate General after consultation with The Inspector General. Also, Federal law requires that an accused in a trial by court-martial will, upon proper court order, be furnished all statements sworn or unsworn in any form which have been given to any Federal agent, employee, investigating officer, or board by any witness who testifies against the accused.

b. Collateral Investigation. The commander who assumes investigative responsibility will, at

the time he appoints the aircraft or missile accident investigation board, direct a collateral investigation under AFR 110-14, when claim(s) against the government for property damage exceeds $25,000, or if fatal or major injury occurs to any person as a result of the accident, or if the possibility of litigation against the government or a government contractor may arise from the accident. The collateral investigation is conducted independently and apart from any portion of the accident investigation, and is used to obtain and preserve all available evidence for use in litigation, claims, disciplinary action, or adverse administrative actions. (See AFR 110-14 for factual information that may be released to a collateral board as well as nonfactual material that will not be furnished to a collateral board.)

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